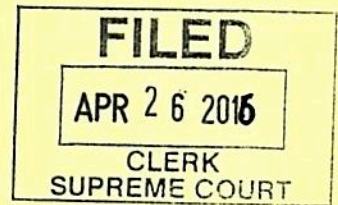


**Commonwealth of Kentucky**  
**Supreme Court**  
No. 2015-SC-000021-DG



(Court of Appeals No. 2012-CA-001828-MR)

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

Appeal from Monroe Circuit Court  
Hon. Eddie Lovelace, Judge  
Indictment No. 10-CR-00118

RITA MITCHELL

APPELLEE

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**Reply Brief for Commonwealth**

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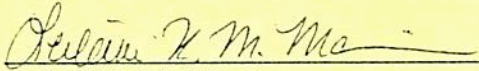
Submitted by,

**ANDY BESHEAR**  
Attorney General of Kentucky

**Leilani K. M. Martin**  
Assistant Attorney General  
Office of Criminal Appeals  
Office of the Attorney General  
1024 Capital Center Drive  
Frankfort, Kentucky 40601  
(502) 696-5342

CERTIFICATE OF SERVICE

I certify that the record on appeal has not been checked out, and that a copy of the Reply Brief for Commonwealth has been served on 26 April 2016 as follows: by mailing to the trial judge, Hon. David L. Williams, Circuit Judge, 112 Courthouse Square, P.O. Box 660, Burkesville, KY, 42717; by state messenger service to Hon. Roy A. Durham, Assistant Public Advocate, 5 Mill Creek Park, Section 100, Frankfort, KY, 40601; and by sending electronic mail to Hon. Jesse Stockton, Commonwealth Attorney.

  
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Leilani K. M. Martin  
Assistant Attorney General

### LIMITED PURPOSE STATEMENT

The Commonwealth limits its reply to issues requiring response as a result of the Commonwealth's review of Appellee's brief, and continues to rely upon its initial Brief for the Commonwealth. No concessions by the Commonwealth are intended by failure to reiterate the same arguments below.

### ARGUMENT

#### I.

#### **WHETHER OR NOT THE ISSUE OF DUTY WAS PRESERVED BELOW, APPELLEE OWED A DUTY TO KALVIN AND WAS PROPERLY CONVICTED OF ASSAULT IN THE SECOND DEGREE**

Appellee persists in re-casting herself as a second victim of Donna Bartley's by analogizing herself to Calvin. In so doing, Appellee hopes to have this Court determine that neither Appellee nor Calvin can be held responsible for the torture that Calvin endured. The Commonwealth fiercely disputes this misrepresentation. Calvin was severely retarded from birth, possessed the barest, most rudimentary speech capabilities and was completely immobile. Unfortunately, none of these conditions rendered him incapable of suffering, and suffering of an inhumane and monstrous type is what Appellee inflicted upon him. It is the magnitude of Calvin's suffering that haunts the Commonwealth. Appellee's sometime diseased malaise arising from depression does not make her anyone's victim. This malaise was selectively exercised by Appellee; not at all as to herself, and to maximum effect as to Calvin.

Appellee had a diagnosis of depression and COPD. To equate Calvin's heartbreaking and completely debilitating vulnerability as akin to Appellee's

significantly lesser afflictions is a grotesque effrontery. Appellee began caring for Calvin seventeen (17) years prior. The significance of this is that, for seventeen (17) years, it was Appellee who was intimately acquainted with Calvin's limitations, more so than even Calvin's own actual mother, as Donna did not provide the hands-on care that Appellee did. This is because it was in exchange for Calvin's care that Donna provided Appellee with room and board.

The proof of all this lies within Appellee's own attestations. Appellee testified that she had lived with Donna's family in the trailer for seventeen (17) years, but since June or July 2010, only Appellee and Calvin lived in the trailer. (VR 9/13/11; 2:08:45-2:09:40). Appellee testified it was she, not Donna, who had taken care of Calvin for most of his life. (VR 9/13/11; 2:16:10-2:16:37). Appellee testified it was she, not Donna, who had deliberately set a radio to a blaring volume every single day that summer; to drown out Calvin's screams of pain and terror. (VR 9/12/11; 2:17:50-2:18:20) Appellee testified that it was she, not Donna, who took the food and water that Donna brought regularly to the trailer and routinely did not give Calvin the benefit of either. (VR 9/13/11; 2:13:00) It was Appellee, not Donna, who locked the door to Calvin's bedroom.

The Commonwealth notes that as dire as Appellee's depression may have become during those summer months, she nonetheless rallied the intestinal fortitude to ensure that she regularly had access to fresh oxygen tanks to counteract the deleterious affects of her COPD, to keep her cell phone in good working order, to keep on feeding and watering herself - all while Calvin was starving, naked, and literally rotting to death in a back bedroom, mere feet from her. Appellee's access to a cell phone is all the more galling

because using it just once is all that would have been required to revoke her voluntary assumption of care of Calvin, and to relinquish her actual custody of Calvin.

Appellee's attempt to prove that she was in fear of Donna is refuted by her own testimony. Appellee testified that she was afraid of Donna "in a way," and depended on her for food, clothing and her existence. (VR 9/13/11; 2:22:10-2:22:30). She said that Donna would pick up her disability check from the trailer that she and Calvin lived in. (VR 9/13/11; 2:15:40; 2:22:55) This does not constitute coercion or duress or even mere intimidation, since Donna simply was not physically present at the trailer that summer short of her regular drop off of groceries at the door to Appellee. Rather, Appellee relied on Calvin's checks for income just as much as Donna, and therefore had her own independent reason to obscure Calvin's existence from others. Appellee could not afford to live on her own with just her own disability check income; hence the agreement she brokered with Donna seventeen (17) years ago to care for Calvin in exchange for room and board.

Appellee already tried this "second victim" theme in front of the trier of fact at her jury trial. The jury simply did not believe her. Every point that Appellee makes, as to her depression and COPD, her disability income, that Donna was higher functioning than Appellee; all this had been proven to the jury panel. General truisms that depression and COPD cause lethargy and perpetuate inertia - the Commonwealth readily acknowledges these truisms and acknowledges they may have had some role in this case. However, Appellee's lethargy and inertia, despite having been presented to the jury as having a medical etiology, apparently did not work to negate the jury's conclusion that she injured

Kalvin grievously and seriously. The lack of evidence of proportionate self-neglect by Appellee and the obviousness of Appellee's actual self-care during those same summer months that Calvin was forced to lie in a pool of waste naked and starving to death, evidently painted too glaring a contrast for the jury and served to severely undercut her credibility with them. These are determinations that are understood to exclusively lie within the province of a fact finder to make. An appellate panel, for whom it is an act of legal impropriety to do so in the fact finder's stead, should not invade this province. It is this fundamental mistake by the Court of Appeals for which the Commonwealth presently seeks relief before this Court.

### **CONCLUSION**

For all of the foregoing reasons, as well as those contained within the Commonwealth's "Brief for the Commonwealth," this Court should reverse the Court of Appeals, and affirm Appellee's convictions before the trial court.

Respectfully Submitted

**ANDY BESHEAR**

Attorney General of Kentucky



**Leilani K. M. Martin**

Assistant Attorney General

1024 Capital Center Drive

Frankfort, Kentucky 40061-8204

(502) 696-5342

Counsel for Commonwealth

